86-107

Supreme Court, U.S.
FILED
JUL 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MOBILE DODGE, INC.,

Appellant,

v.

DANNY R. ALFORD,

Appellee.

On Appeal From The Supreme Court Of Alabama

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether § 12-22-72, *Code of Alabama* (1975), under which a mandatory penalty of ten percent of any money judgment is automatically imposed on an unsuccessful defendant-appellant, but which imposes no corresponding burden on an unsuccessful plaintiff-appellant, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the award of approximately $124,000 in punitive damages against appellant is violative of the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the Constitution, and is otherwise invalid under the Due Process Clause of the Fourteenth Amendment because it is grossly disproportionate to the wrong sought to be punished and equally out of scale with penalties prescribed by the Alabama legislature for analogous criminal conduct.*

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* Appellant, Mobile Dodge, Inc., is a closely held Delaware corporation which has no parent, affiliate or non-wholly owned subsidiary for purposes of Rule 28.1 of the Rules of this Court.

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JURISDICTIONAL STATEMENT

Mobile Dodge, Inc., the appellant, appeals from so much of a final decision of the Supreme Court of Alabama dated February 14, 1986, as affirmed a judgment of approximately $124,000 in punitive damages against it by the Circuit Court of Mobile County, the order of that Court dated February 14, 1986 and issued by the clerk of the court below on May 13, 1986 by which a ten percent appeal penalty was imposed on the appellant pursuant to § 12-22-72, *Code of Alabama* (1975), and the order of the Supreme Court of Alabama dated April 25, 1986, overruling appellant's Application for Rehearing filed with respect to the February 14, 1986 decision. Under this decision and these orders, appellant's rights under the Excessive Fines Clause of the Eighth Amendment, as made applicable to the States by the Due Process Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment, have been denied. Moreover, § 12-22-72, *Code of Alabama* (1975), under which an automatic penalty of ten percent of the total $125,000 judgment was imposed on appellant, has been upheld, *sub silentio*, against appellant's claim that that statute on its face and as applied violates appellant's rights under the Equal Protection Clause of the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama of February 14, 1986 is reproduced in App. A, *infra*, 1a-13a, and is officially reported at 487 So.2d 866 (Ala. 1986). The order of the Supreme Court of Alabama of April 25, 1986 is reproduced in App. B,

infra, 14a-15a, and is unreported. The order of the court below of February 14, 1986 is reproduced as App. C, *infra*, 16a-17a, and is unreported. The Circuit Court of Mobile County issued no opinion.

JURISDICTION

The February 14, 1986 decision, and February 14 and April 25 orders of the Supreme Court of Alabama necessarily upheld, *sub silentio*, § 12-22-72, *Code of Alabama* (1975), against appellant's claim under the Equal Protection Clause of the Fourteenth Amendment that § 12-22-72 is facially unconstitutional. Because the February 14 order assessing a ten percent penalty against appellant pursuant to this statute was compelled by the February 14, 1986 decision of the Supreme Court of Alabama and was therefore not part of any appealable judgment until that time, appellant's federal constitutional challenge to § 12-22-72 was, pursuant to an unbroken line of seventeen cases decided over a 125-year period by the Supreme Court of Alabama, presented in appellant's brief in support of its Application for Rehearing.[1] A Notice of Appeal of this case to this Court was filed in the court below on July 18, 1986. App. D, *infra*, 18a. This Court has jurisdiction of this case under 28 U.S.C. § 1257(2). Question 2 was duly presented to the Supreme Court of Alabama as discussed *infra* and may be decided

[1] Under Rule 20, Ala. R. App. P., "Assignments of error are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 shall be sufficient." This Court has expressly relied upon presentation in briefs before the Supreme Court of Alabama in finding that a federal question was properly presented. *NAACP* v. *Alabama*, 377 U.S. 288, 293 n.4 (1964). Appellant has lodged with the Clerk of this Court ten copies of its Brief in Support of Its Application for Rehearing in connection with the docketing of this appeal.

with this appeal. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

This appeal is being docketed in this Court within 90 days from the April 25, 1986 order of the Supreme Court of Alabama overruling appellant's Application for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment of the Constitution, provides, in pertinent part, that:

> [N]or [shall] excessive fines [be] imposed . . . .

2. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> [N]or shall any State deprive any person of . . . property, without due process of law . . . .

3. The Equal Protection Clause of the Fourteenth Amendment of the Constitution, provides, in pertinent part, that:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

4. Section 12-22-72, *Code of Alabama* (1975), provides, in pertinent part, that:

> When a judgment . . . is entered . . . for money . . . and the same has been stayed on appeal by execution of bond, with surety, if the appellate court affirms the judgment of

> the court below, it must also enter judgment against any or all of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court . . . .

STATEMENT OF THE CASE

Appellant seeks plenary consideration of its contentions that so much of a total judgment of $125,000 as was imposed on it in punitive damages, and the $12,500 appeal penalty automatically adjudged on that $125,000 total judgment under § 12-22-72, *Code of Alabama* (1975), have deprived appellant of substantial rights guaranteed by the specific provisions of the Constitution of the United States enumerated above. The constitutional issues presented are substantial; Question 2 is virtually identical to Question 4 as briefed and argued to, but not decided by, this Court in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (April 22, 1986), 106 S. Ct. 1580 (1986). Question 1 is identical to Question 1 as presented to this Court in *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986). These issues, as the following discussion demonstrates, are substantial and were properly presented to the Supreme Court of Alabama.

A. Facts Relevant to the Constitutional Questions Presented[2]

On July 4, 1982, Frank W. Allison purchased a 1978 Corvette from a Texas automobile dealer. On August

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[2] The subsequent recitation of facts is largely limited to those facts relevant to only one of the counts of the complaint which went to the jury. That count, App. A, *infra*, 7a, 487 So.2d, at

16, 1982, he applied for a certificate of title for the Corvette in Alabama and on September 26, 1982, the Corvette was traded by Mr. Allison to the appellant as a down payment on a new truck. On September 30, 1982, the appellee purchased the Corvette from the appellant and, in that transaction, the appellant warranted that it had good title to the Corvette. The vehicle identification number ("V.I.N.") given for the Corvette in the bill of sale was V.I.N. 9392.

The Alabama title to the vehicle did not actually issue to the appellee until February 2, 1983. Before issuance of that title, the vehicle had been inspected by John Reid, a criminal investigator with the Alabama Bureau of Investigation. That inspection came as a consequence of the fact that Mr. Allison's basis for applying for an Alabama title was a "salvage certificate of title" issued by the State of Texas. The purpose of that inspection was to ensure that the V.I.N.s stamped on the vehicle in several places were all the same. Mr. Reid's inspection disclosed V.I.N. 9392 stamped on the Corvette in three places and, based on that inspection, an Alabama title was issued for V.I.N. 9392.

Subsequently to the filing of this lawsuit, the Corvette was reinspected by Mr. Reid at the request of appellee's attorney; that inspection revealed for the first time that the Corvette was really an amalgam of two Corvettes; the V.I.N. on the frame of the

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869, charged that appellant had misrepresented to the appellee that it was giving him good title to the Corvette. As explained in the opinion of the court below, App. A, *infra*, 8a, 487 So.2d, at 869-70 & n.1, this misrepresentation count had to be sustained as a matter of state law in order for the jury's general verdict to stand.

vehicle—not checked by Mr. Reid on his first inspection—was V.I.N. 4708. Mr. Reid subsequently determined that a Corvette with V.I.N. 4708 had been stolen in 1978 while in transit in Kentucky.

The appellee filed this action on January 12, 1983. After the evidence was presented to the jury, the trial court instructed the jury regarding the appellee's claim for punitive damages, stating: "The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future." (RR-265). (Ten copies of the pertinent portion of the jury instruction have been lodged with the Clerk of this Court in connection with the docketing of this appeal). After trial, the jury returned a general verdict in favor of the appellee in the sum of $125,000, *see* note 11, *infra*, and this appeal followed.

The count of the complaint at issue in the Supreme Court of Alabama on appeal was based on a right of action under § 6-5-103, *Code of Alabama* (1975). That statute creates a right of action for "misrepresentation of a material fact made to induce another to act" and, when enacted, was merely declaratory of the common law. *Horton* v. *Belcher*, 195 Ala. 186, 70 So. 141 (1915). The specific misrepresentation alleged and found by the court below to have been supported by sufficient evidence involved appellant's representation to the appellee that in selling the Corvette, the appellant had a good title to the vehicle to transfer to the appellee.

The jury's verdict and the trial court's judgment were affirmed on the basis of the conclusion of the

court below that the appellant "knew or should have known that it did not have good title to the Corvette . . . ." App. A, *infra*, 8a, 487 So.2d, at 870.

B. The Federal Questions Were Properly Presented

Appellant recognizes that it bears the burden to persuade this Court of its jurisdiction over this appeal in the absence of any express reference in the opinion of the court below to the federal constitutional provisions relied upon by appellant in that court. *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983).

1. Presentation of the Federal Constitutional challenge to § 12-22-72, *Code of Alabama* (1975)

Question 1, challenging the constitutionality of § 12-22-72, *Code of Alabama* (1975), was presented to the court below in appellant's brief filed in support of its Application for Rehearing, note 1, *supra*, at 20-23. This was the logical time for appellant to present its challenge to § 12-22-72's constitutionality, since the non-discretionary imposition by the court below of the ten percent penalty on the $125,000 total judgment was not at issue or reduced to any appealable order until that judgment was affirmed.

Appellant's challenge to § 12-22-72 was properly and timely presented in complete conformity with relevant decisions of the Supreme Court of Alabama—a line of at least seventeen cases dating from 1861 in which the federal constitutionality of, or questions regarding the construction of, § 12-22-72 have been drawn into

question at the rehearing stage.[3] In one such case, § 12-22-72 was challenged under the Equal Protection Clause for the first time in an Application for Rehearing in the Supreme Court of Alabama. Without any suggestion that raising the issue at that stage was in any way improper or inconsistent with Alabama practice, the Supreme Court of Alabama, consistent with its routine practice, entertained (and rejected) that federal constitutional challenge to § 12-22-72 on the merits. *Central of Georgia Ry. Co.* v. *Steed*, 287 Ala. 64, 76-77, 248 So.2d 110, 120-21 (1979).

It is also important to note that the Supreme Court of Alabama did not in this case—as it might have done—*deny* appellant's Application for Rehearing, an action which would have indicated that appellant's

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[3] The Supreme Court of Alabama has routinely permitted constitutional and statutory questions regarding § 12-22-72 to be raised in an Application for Rehearing or an equivalent post-judgment motion. *See Brown Mech. Contractors, Inc.* v. *Centennial Ins. Co.*, 431 So.2d 932 (Ala. 1983); *First Alabama Bank of Montgomery, N.A.* v. *Martin*, 425 So.2d 415 (Ala. 1983); *Chapman* v. *Rivers Const. Co.*, 284 Ala. 633, 227 So.2d 403 (1969); *City of Troy* v. *McLendon*, 279 Ala. 553, 188 So.2d 281 (1966); *Goodyear Tire & Rubber Co.* v. *Downey*, 266 Ala. 344, 96 So.2d 278 (1957); *Patterson* v. *Gains*, 264 Ala. 184, 85 So.2d 893 (1956); *Lloyd* v. *Stewart*, 258 Ala. 627, 64 So.2d 884 (1953); *Childress* v. *Younger*, 258 Ala. 219, 61 So.2d 808 (1952); *City of Birmingham* v. *Bowen*, 254 Ala. 41, 47 So.2d 174 (1950; *Atlanta, Birmingham & Coast R. Co.* v. *Cary*, 250 Ala. 675, 35 So.2d 559 (1948); *Carter* v. *Carter*, 247 Ala. 409, 24 So.2d 759 (1945); *Snellings* v. *Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934); *Dent* v. *Foy*, 210 Ala. 160, 97 So. 627 (1923); *Montgomery Light & Water Power Co.* v. *Thombs*, 204 Ala. 678, 87 So. 205 (1920); *New York Life Ins. Co.* v. *Reese*, 201 Ala. 673, 79 So. 245 (1918); *Lawrence* v. *Jones*, 37 Ala. 388 (1861).

challenge to § 12-22-72 had not been timely presented. Instead, the court below *overruled* appellant's application, an action which, under the practice of the court below, indicates that the court reached and rejected appellant's challenge to § 12-22-72 on the merits. *See, e.g., Hamm* v. *Harrigan*, 278 Ala. 521, 179 So.2d 154 (1965), *cert. denied*, 382 U.S. 981 (1966); *Thompson* v. *State*, 268 Ala. 483, 489, 107 So.2d 890, 895 (1959).

In light of this longstanding and consistent practice, the action of the court below in overruling appellant's Application for Rehearing without any opinion must be deemed by this Court as having implicity upheld the constitutionality of § 12-22-72; that action was presumptively not based on lack of proper presentation of this question. In addition, this Court long ago made abundantly clear that a state court's procedural rules governing presentation of federal questions will not bar this Court's power to review such questions unless those rules are "strictly or regularly" followed. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). Here, the rule in Alabama that has been "regularly" followed itself establishes that appellant challenged § 12-22-72 in a timely fashion.[4]

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[4] Appellant would also bring an additional point to this Court's attention. Appellant presented its challenge to 12-22-72 in a manner indistinguishable from the challenge to the same statute raised by the petitioner in *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986) ("*Burlington Northern*"). In granting that petition for writ of certiorari in the face of an order of the Eleventh Circuit which did not address the merits of the petitioner's constitutional challenge to § 12-22-72, Pet. for Cert., at A-1, this Court necessarily recognized that, as a matter of logic and practice, a challenge to Alabama's

2. Presentation of the Federal Constitutional Challenge to the Excessiveness of the Punitive Damage Award

The excessiveness of the punitive damage award was first challenged by appellant on November 23, 1983 in its post-trial Motion for Judgment Notwithstanding the Verdict, or in the Alternative, For New Trial and/or Remittitur.[5] The substance of Question 2 was also raised in the Brief of Appellant filed with the Supreme Court of Alabama on direct appeal on June 14, 1984. In that brief, appellant brought to the

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appeal penalty statute may be brought after a money judgment has been affirmed. Although the question when a challenge to § 12-22-72 must be raised in order to be considered by the court below is technically an issue of Alabama law, appellant's assertion that such a challenge may be raised by post-affirmance motion is not only not contradicted by any case in the court below, but is also recognized as appropriate by the only other court which has been called upon to apply § 12-22-72. Thus, the Eleventh Circuit has entertained and decided in post-affirmance proceedings various questions arising out of applications of § 12-22-72 to diversity cases coming to it on appeal from the federal district court in Alabama. *See, e.g., Burlington Northern, supra.*

The same understanding also governs with respect to challenges to Mississippi's virtually identical appeal penalty statute, *Miss. Code Ann.* § 11-3-23 (Supp. 1982), in both the Mississippi courts, *see, e.g., Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978) (federal constitutional challenge in post-affirmance proceeding to § 11-3-23 entertained and decided against the challenge), and the Fifth Circuit, *see, e.g., Affolder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) (on motion to assess damages for appeal; motion denied); *Walters* v. *Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) (post-affirmance motion in district court to assess penalty; motion granted).

[5] Ten copies of appellant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for New Trial and/or Remittitur, have been lodged with the Clerk of this Court in connection with the docketing of this appeal.

attention of the court below "the resemblance of punitive damages to criminal sanctions" and argued that the punitive damage award was "excessive."[6] Question 2 was presented once again in appellant's brief in support of its Application for Rehearing; in that brief, at 10, 11, 13 & 14, appellant, for the first time, expressly relied on the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment in support of its argument that the punitive damage award was excessive. Appellant submits that the question raised at the rehearing stage was no more than an "enlargement of the previous challenges" to the excessiveness of the punitive damage award, *Dewey* v. *Des Moines*, 173 U.S. 193, 194-95 (1899), and it is precisely the question appellant presents in this appeal. Thus, appellant is entitled to this Court's review of that question.

Furthermore, no Alabama statute, or rule of civil or appellate procedure, precludes raising new questions in an Application for Rehearing after the announcement of a decision of the Supreme Court of Alabama. Thus, as in Mississippi, *see Hathorn* v. *Lovorn*, 457 U.S. 255, 263 n.13 (1982), the issue of proper presentation is resolved by reference to the actual practice of the Supreme Court of Alabama established by decisional law of that court.

It is clear that the court below does, as a matter of its own practice, entertain and decide constitutional and nonconstitutional questions raised for the first

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[6] Br. of Appellant, at 49, 38. Ten copies of the pertinent portions of appellant's brief on direct appeal to the Supreme Court of Alabama have been lodged with the Clerk of this Court in connection with the docketing of this appeal.

time in an Application for Rehearing. In addition to the seventeen cases cited in note 3 and accompanying text, *supra*, the court below has entertained and decided a wide variety of new questions, including constitutional questions, raised in applications for rehearing over many years.[7] Indeed, even where the court below suggests that it cannot or will not pass on new questions said to be "improperly" raised, it frequently will proceed to pass on such questions. *See, e.g., Lovett* v. *Uptain*, 450 So.2d 113, 116 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116, 118 (Ala. 1984); *King* v. *Reid*, 428 So.2d 611, 615 (Ala. 1983); *Kirkland* v. *Kirkland*, 281 Ala. 42, 49, 198 So.2d 771, 777 (1967); *Ex parte Hanna*, 267 Ala. 527, 103 So. 2d 720 (1958).

Thus, under the circumstances of this case, even an express ruling by the court below denying appellant's Application for Rehearing on procedural grounds would not have extinguished this Court's power to decide these federal constitutional questions. This Court's decision in *Barr* v. *City of Columbia*,

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[7] *Louisville & Nashville Ry. Co.* v. *Western Union Telegraph Co.*, 195 Ala. 124, 71 So. 118 (1916); *Dunn* v. *Dean*, 196 Ala. 486, 71 So. 709 (1916); *Copeland* v. *Pope*, 198 Ala. 257, 73 So. 490 (1916); *Gibbons* v. *Gibbons*, 205 Ala. 636, 88 So. 833 (1921); *Martin Building Co.* v. *Imperial Laundry Co.*, 220 Ala. 90, 124 So. 82 (1929); *Consolidated Coal Co.* v. *State*, 236 Ala. 489, 183 So. 650 (1938); *Huie* v. *Smith*, 236 Ala. 516, 183 So. 661 (1938); *Federal Land Bank of New Orleans* v. *Williams*, 237 Ala. 318, 186 So. 689 (1939); *Dodson* v. *Beaird*, 237 Ala. 587, 187 So. 862 (1939); *Sisson* v. *Swift*, 243 Ala. 289, 9 So.2d 891 (1942); *Goodgame* v. *Dawson*, 242 Ala. 499, 7 So.2d 77 (1942); *Rudolph* v. *Rudolph*, 251 Ala. 317, 36 So.2d 902 (1948); *Howell* v. *Roueche*, 263 Ala. 83, 81 So.2d 297 (1955); *Bienville Mortgage Corp.* v. *Mayo*, 286 Ala. 675, 245 So.2d 819 (1971).

378 U.S., at 149, requires that procedural barriers to consideration of federal questions be "strictly or regularly followed" in order to deprive this Court of power to review substantial federal constitutional questions. There was, of course, no such express ruling below and, as pointed out above, the "overruling" of appellant's Application for Rehearing strongly suggests, standing alone, that appellant's constitutional questions were rejected on their merits.

As this Court has recently stated, "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn* v. *Lovorn*, 457 U.S., at 263. Indeed, this Court's decision in *Hathorn* suggests that a state court's *past* consistent practice of refusing to consider new issues raised on rehearing will not preclude review of federal constitutional questions by the Court where the *current* practice of that state court is to consider such issues. *Hathorn* v. *Lovorn*, 457 U.S., at 263-64 & nn.13-14. It is clear that the Supreme Court of Alabama has not in the past, nor does it now, consistently refuse to consider issues raised for the first time in an Application for Rehearing.[8]

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[8] *See* notes 3 & 7, *supra*. This Court's suggestion to the contrary in *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983), is neither dispositive of this issue nor can its suggestion in *Exxon* be reconciled with its holding in *Hathorn* v. *Lovorn*, *supra*. In the *Exxon* case, this Court declined to reach the question whether the Alabama statute at issue was preempted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.* (1976 ed. and Supp. V) ("EPAA"). In doing so, the Court observed that the "general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." 462

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The substantiality of the federal questions to be presented in this appeal is established by this Court's

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U.S., at 181 n.3. This observation, however, was made without any briefing of this issue by any of the parties before the Court. Appellant has brought to the attention of this Court in this Jurisdictional Statement thirty-five cases in the court below in which issues raised for the first time *on rehearing* have been decided on the merits.

Appellant's point is not academic. For example, one of the cases relied on in footnote 3 of *Exxon* was *Burton* v. *Burton*, 379 So.2d 617, 618 (Ala. Civ. App. 1980), in which, because it had not been raised in a timely fashion, the Court of Civil Appeals refused to decide an equal protection challenge similar to that decided by this Court in *Orr* v. *Orr*, 440 U.S. 268 (1979). That same court had previously refused to entertain a similar challenge for the same reason in *Hughes* v. *Hughes*, 362 So.2d 910 (Ala. Civ. App.), and the Supreme Court of Alabama dismissed a petition for a writ of certiorari. *Hughes* v. *Hughes*, 362 So.2d 918 (Ala. 1978). Notwithstanding these actions by the Alabama courts, which were brought to the attention of this Court by the appellee in *Hughes*, Motion to Dismiss or Affirm, at 2, this Court took jurisdiction over the appeal in *Hughes* and vacated the judgment of the court below. *Hughes* v. *Hughes*, 441 U.S. 901 (1979). The *Exxon* Court's citation of *Burton* cannot be reconciled with the Court's action in *Hughes* any more than its assumption in *Exxon* regarding the general practice of the Alabama courts can be reconciled with the many cases now brought to the Court's attention by appellant. The Court's action in *Exxon* can, however, be explained by reference to the suggestion by the Solicitor General in *Exxon* that because the issue of preemption under the EPAA had not been raised in the trial court, the record before the Court was factually deficient for purposes of deciding that preemption issue. Br. for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* Supporting Reversal, at 12 n.10. There is no such de-

decision in *Aetna Life Insurance Co.* v. *Lavoie*, slip op., at 14, 106 S. Ct., at 1589, and by this Court's grant of certiorari in *Burlington Northern* as to the constitutionality of Alabama's appeal penalty statute. Accordingly, because the Court is already quite familiar with the questions involved, appellant will only briefly set forth its arguments that the questions are substantial.

A. The Unconstitutionality of § 12-22-72, Code of Alabama (1975)

Under § 12-22-72, *Code of Alabama* (1975), a defendant-appellant, like appellant here, is subjected to an automatic, non-discretionary ten percent penalty payable to the appellee upon affirmance of a money judgment without regard to the novelty or complexity of the factual or legal issues presented in a particular appeal.

If § 12-22-72 is designed to prevent frivolous appeals, it is both indiscriminately overinclusive and unreasonably severe, because it punishes those who pursue non-frivolous appeals in an extravagant sum totally unrelated to the costs imposed by that appeal on the appellee. At the same time, it is irrationally

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ficiency here.

The other two cases in the court below relied upon in footnote 3 of *Exxon*, *State* v. *Newberry*, 336 So.2d 181, 183 (Ala. 1976), and *State* v. *Graf*, 280 Ala 71, 72, 189 So.2d 912, 913 (1966), do not pronounce a rule of general applicability; rather, they apply a distinct rule under which the State, in condemnation proceedings, is precluded from raising certain issues on appeal if it has not challenged the damages awarded for the particular taking involved. Thus, those two cases are readily distinguishable as involving a "special rule." *Hathorn* v. *Lovorn*, 457 U.S., at 263 n.13.

underinclusive because a plaintiff who fails to recover a money judgment at trial may take an unsuccessful appeal on wholly frivolous grounds without the risk of any comparable penalty whatsoever.[9]

Appellant will argue to the Court that this statute, which exists in the same non-discretionary form in only one other State, Mississippi, is irreconcilable with, and therefore must be struck down under, this Court's decision in *Lindsey* v. *Normet*, 405 U.S. 56 (1972). In *Lindsey*, this Court invalidated an Oregon Statute that required a particular class of losing defendants, tenants, to post a double bond in order to appeal from a judgment in favor of their landlord. The Court stated that a State may act "to discourage patently frivolous appeals . . . if [its] rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." *Id.*, at 78. Section 12-22-72 fails both these tests.

If, as the Aetna Life Insurance Company argued to this Court in No. 84-1601, and as the Burlington Northern Railroad Company argues in its petition for certiorari in No. 85-1088, § 12-22-72 functions to deny losing appellants an equal opportunity to pursue their right of statutory appeal within the Alabama courts and the right of appeal within the federal court sys-

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[9] Under Rule 38, Ala. R. App. P., both plaintiffs and defendants who take appeals in civil cases are treated in an evenhanded manner as regards the *damages* and *costs* incurred in defending a judgment that is appealed either by plaintiffs or defendants where the judgment below is affirmed and the appeal is determined to have been frivolous. This rule, in sharp contrast to § 12-22-72, adequately fulfills the legitimate state purpose of curbing abuse of the right to appeal and serves to accentuate the arbitrariness of § 12-22-72.

tem in diversity cases, then the need for this Court to address this question is manifest.[10]

B. The Excessive Fines and Due Process Clause Question

The question whether the Excessive Fines Clause applies to a punitive damage award that is grossly disproportionate to punishments imposed by the State of Alabama for analogous criminal conduct was briefed and argued in *Aetna Life Insurance Co.* v. *Lavoie*, *supra*, and is currently before this Court in *Treadwell Ford, Inc.* v. *Campbell*, No. 85-1799 (appeal docketed May 7, 1986). The arguments advanced to the Court by the appellants in *Aetna* and *Treadwell Ford* are fully applicable to this case.

As this Court's decision in *Solem* v. *Helm*, 463 U.S. 277 (1983), establishes, the historical roots of the Excessive Fines Clause and the "principle that a punishment should be proportionate to the crime" may be traced back to Magna Carta's regulation of "excessive amercements." 463 U.S., at 284. Indeed, as the Court observed in *Solem*, the guarantees in Magna Carta against the imposition of excessive fines were not "hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." *Id.*, at 285. A case relied on by the Court to support this statement, *Le Gras* v. *Bailiff of Bishop of Winchester*,

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[10] If this Court were to decide in *Burlington Northern* that § 12-22-72 is "procedural" for purposes of the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and that therefore the penalty assessed under § 12-22-72 against Burlington Northern was wrongly assessed on that ground, this Court would presumably not reach Question 1 presented in Burlington Northern's petition for certiorari—whether § 12-22-72 is unconstitutional under the Fourteenth Amendment.

Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934), illustrates the application of the excessive amercement principle of Magna Carta to a fine imposed in a civil proceeding. That principle, incorporated into the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, Ch. 2, and subsequently into the Virginia Declaration of Rights (1776), was then enshrined in the Eighth Amendment by its Framers. *Solem* v. *Helm*, 463 U.S., at 285 & n.10.

There is no disagreement in this Court with the proposition that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham* v. *Wright*, 430 U.S. 651, 669 n.37 (1977); *id.*, at 685 (White, J., dissenting). If the imposition of a large fine in order to punish and deter others is not sufficiently analogous to a criminal punishment for the Eighth Amendment to apply, serious doubt would be cast on the continuing vitality of cases such as *Trop* v. *Dulles*, 356 U.S. 86 (1958), and *In re Gault*, 387 U.S. 1 (1967), which have been cited by this Court as examples of punishment administered in non-criminal proceedings to which the Eight Amendment is applicable. *Ingraham* v. *Wright*, 430 U.S., at 669 n.37 & 671-72 n.40.

The punitive damage award in this case comprised approximately $115,000 to $124,000 of the total $125,000 award to the appellee.[11] It is clear under

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[11] The trial court instructed the jury that the appellee could recover punitive and compensatory damages. The jury returned a general verdict of $125,000 and, as observed by the court

the law of the court below that punitive damages are imposed for the sole purposes of punishment and deterrence. *See, e.g., Carter* v. *City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984); *State Docks Commission* v. *Barnes*, 225 Ala. 403, 143 So. 581 (1932). Similarly, punitive damages awarded in fraud cases, customarily referred to by the court below as "sweat money," are intended to punish the defendant and to set an example to others who may have contemplated similar actions. *Southern Life and Health Insurance Co.* v. *Whitman*, 358 So.2d 1025, 1027 (Ala. 1978) (Jones, J., concurring); *Old Southern Life Insurance Co.* v. *Woodall*, 348 So.2d 1377, 1383 (Ala. 1977); *Loch Ridge Construction Co.* v. *Barra*, 291 Ala. 312, 317, 280 So.2d 745, 751 (1973).[12]

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below, determination of how much of that $125,000 total award constituted punitive damages was not an issue it had to resolve. App. A, *infra*, 13a, 487 So.2d, at 872. In the appellee's brief on direct appeal, at 44, appellee took the position that $115,672 of the total award constituted punitive damages. Ten copies of the pertinent portion of appellee's brief have been lodged with the Clerk of this Court in connection with the docketing of this appeal. Appellant took the position that only $1,000 of that award constituted compensatory damages, *see* Br. of Appellant, at 38, note 6 *supra*. Appellant is prepared to assume, for purposes of this appeal, that the figure of $115,672 comprises all of the punitive damages awarded; the actual amount, an issue of state law, is pertinent only to the relief to be awarded to appellant on remand of this case to the court below should appellant prevail on Question 2.

[12] These characterizations of the purposes of these types of punitive damage awards pretermits the need for the kind of searching inquiry into the intent behind the authorization for a particular fine or punishment that has normally accompanied this Court's decisions applying constitutional provisions such as the

This punitive damage award is grossly disproportional to the wrong it punishes. If appellant's conduct against the appellee were punishable under Alabama's criminal statutes related to business fraud and conspiracy, and if appellant had been convicted of business fraud and conspiracy under those statutes after enjoying the full protections of the Sixth and Fourteenth Amendments, the maximum monetary penalty that could be assessed against appellant would be $1,500. §§ 13A-4-3, 13A-5-12 and 13A-9-41 *et seq.*, *Code of Alabama* (1975). Thus, the punitive damage award in this case is at least 77 times the maximum punishment assessed by the Alabama legislature for business conduct of a similar nature which has been adjudicated to be a crime. Under those Alabama statutes, the fine imposed also would have been paid into the treasury of Alabama, whereas the award to the appellee is nothing more than a windfall.

Whether addressed under the Excessive Fines Clause or directly under the Due Process Clause of the Fourteenth Amendment, the gross disproportionality of the fine in this case, exacerbated by the magnifying effect of the additional ten percent penalty imposed by § 12-22-72, *Code of Alabama* (1975), presents a substantial federal question. There is no significant state interest in meting out punishment in a civil proceeding "based upon the caprice and prejudice of jurors." *Smith* v. *Wade*, 461 U.S. 30, 51 (1983) (Rehnquist, J., dissenting).

As illustrated by this case and other cases in the court below either presently on this Court's docket,

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Bill of Attainder Clause to cases involving neither a criminal trial as such nor incarceration. *See, e.g., United State* v. *Lovett*, 328 U.S. 303 (1946).

Treadwell Ford, Inc. v. *Campbell, supra*, or recently disposed of by this Court, *Aetna Life Insurance Co.* v. *Lavoie, supra*, the apparent rule of law in Alabama is that punitive damage awards may be imposed in large and wholly whimsical sums by juries. Indeed, on November 15, 1985, the Supreme Court of Alabama affirmed, after remittitur, a judgment of $2,800,000 in punitive damages against General Motors Corporation for wrongful death in connection with an automobile crash. *General Motors Corp.* v. *Edwards*, 482 So.2d 1176 (Ala. 1985). Thus, for the routine conduct of business in Alabama, businesses subject themselves to the imposition of enormous punitive damage awards by juries which have been given *carte blanche* by the Alabama courts to create and impose their own systems of fines in each and every case that goes to a jury. In the absence of a decision by this Court holding that the Excessive Fines Clause controls punitive damage awards, the court below will continue to defer to the jury's unbridled discretion to award excessive punitive damages.

This Court has the power and responsibility under the Eighth and Fourteenth Amendments to place constitutional restraints on such arbitrary awards. The punitive damage award here is excessive both in kind, because it serves no valid state purpose, and in degree, because it is grossly disproportionate to the level of punishment imposed by the Alabama legislature for analogous criminal conduct.

CONCLUSION

Appellant's federal constitutional claims are substantial. Appellant has been fined an amount grossly out of proportion to the punishment which could have

been imposed upon it under Alabama statutes punishing analogous criminal conduct, and it has been fined severely and arbitrarily for exercising its statutory right to appeal that judgment to the State's highest court.

This Court had before it the substance of these issues in a virtually identical context in *Aetna Life Insurance Co.* v. *Lavoie*. In its decision in *Aetna*, this Court stated in unmistakable words that "these arguments raise important issues which, in an appropriate setting, must be resolved . . . ." Slip op., at 14, 106 S. Ct., at 1589. This case presents an "appropriate setting" in which to resolve these important issues. Appellant has pressed its federal constitutional challenges to this punitive damage award and to § 12-22-72 at every appropriate stage in this litigation.[13]

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[13] Appellant is clearly entitled to have applied to this case any ruling of this Court on Question 1 as presented in *Burlington Northern* or this Court's ruling in any other case in which questions similar to those presented by appellant may be presented to and decided by this Court. *See, e.g., Henry* v. *Collins*, 380 U.S. 356 (1965) (*per curiam*) (application of constitutional rule announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to libel judgment on certiorari to Supreme Court of Mississippi); *Hughes* v. *Hughes*, 441 U.S. 901 (1979) (application of decision in *Orr* v. *Orr*, 440 U.S. 268 (1979), to case on appeal from Supreme Court of Alabama notwithstanding that Alabama courts had held federal question not timely presented).

Because this Court took no action during its October, 1985 Term on the appeals docketed in *American General Life and Accident Ins. Co.* v. *Miller*, No. 85-1429 (appeal docketed Feb. 26, 1986), *Bankers Life and Cas. Co.* v. *Crenshaw*, No. 85-1765 (appeal docketed Apr. 25, 1986), and *Treadwell Ford, Inc.* v. *Campbell*, No. 85-1799 (appeal docketed May 7, 1986), all of which raise jurisdictional and substantive issues similar or iden-

Probable jurisdiction should be noted and this case set for argument.

July 24, 1986 Respectfully submitted,

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tical to the jurisdictional and substantive issues presented by this appeal, appellant assumes that the Court may want to hold this case at least until issuance of its decision in *Burlington Northern R. Co.* v. *Woods* is handed down. Irrespective of which question(s) is reached and decided in *Burlington Northern*, this case should continue to be held until another case on the Court's docket which presents Question 2 presented herein has been accorded plenary consideration and decided. At that point, an appropriate disposition of this appeal can be made based upon this Court's decision on the merits of the applicability of the Excessive Fines Clause to punitive damage awards imposed in civil actions. If decided favorably to the appellant herein, the decision in this case should then be vacated and remanded to the court below for reconsideration on that basis and also on the basis of *Burlington Northern* if § 12-22-72 is declared unconstitutional in that case.

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APPENDIX

APPENDIX A

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1985-86

84-1006

MOBILE DODGE, INC., a Corporation
v.
DANNY R. ALFORD

APPEAL FROM MOBILE CIRCUIT COURT

FILED
FEB. 14, 1986
CLERK
SUPREME COURT OF ALABAMA
HOUSTON, JUSTICE.

Mobile Dodge, Inc., appeals from the judgment of the trial court entered pursuant to a jury verdict of $125,000 in favor of the plaintiff, Danny Alford, in this action for fraud arising from the sale of 1978 Chevrolet Corvette. We affirm.

The Corvette which was sold by Mobile Dodge to Alford had been rebuilt with parts from two automobiles, one bearing vehicle identification number 1Z87L8S414708 (hereinafter V.I.N. 4708), and the other bearing vehicle identification number 1Z87LS419392 (hereinafter V.I.N. 9392). The automobile bearing V.I.N. 4708 had been stolen

in 1978 while in transit from Louisville, Kentucky. The automobile bearing V.I.N. 9392 had been wrecked in Texas in 1981. Most of the remaining material facts in the case are in dispute.

The following evidence was presented by the plaintiff which the jury could have believed, and evidently did:

On September 30, 1982, Alford bought a 1978 Corvette, which appeared to be a "Silver Anniversary" model, from Mobile Dodge. He had been told by the salesman at Mobile Dodge that the automobile was in excellent condition and had never been wrecked. He was also told that the Corvette was eligible for a "Chrysler Used Vehicle Protection Plan" which would have protected him from loss if major repairs were to become necessary.

Twenty days after the purchase, Alford was given notice that the Corvette was not eligible for the Used Vehicle Protection Plan. Meanwhile, Alford had been having problems with the Corvette. He testified that that sun visor on the Corvette had fallen off; the power windows would not work; one of the pillar posts was out of line; the "air conditioner blew out hot and cold air at the same time"; the harmonic balancer had fallen off; and the transmission support had "busted," knocking both mufflers off.

Disturbed and dissatisfied with the service he had received from Mobile Dodge, Alford took the Corvette to Gulf Coast Corvettes, a repair shop specializing in Corvettes. The owner of that shop, Bob Gechijian, testified that when he inspected the Corvette, he found a clutch pedal hidden under the floor carpet. He testified this was an indication that the automobile, although it now had an automatic transmission, had once had a standard transmission. The fact was substantiated by the presence of a smaller brake pedal than would normally accompany an automatic transmission.

Gechijian further testified that the factory metal transmission lines had been cut and replaced with rubber hose.

He stated that these rubber hose lines created a dangerous condition because transmission fluid is corrosive to rubber. Moreover, he discovered that although the Corvette appeared to be a "Silver Anniversary" 1978 Corvette, in fact, it was not; it had been repainted to resemble that particular Corvette model. Gechijian testified that it was his opinion that someone with knowledge of Corvettes would have noticed that the automobile had been repainted and would have realized that the small brake pedal was inconsistent with an automatic transmission. He testified that these facts indicated that the automobile had been wrecked and then rebuilt. Armed with that suspicion, he stated, a dealer should have put the automobile up on a rack. If they had done so, according the Gechijian, the dealer would have discovered extensive rust in the frame and noticed other damage to the frame.

Alford's problems with the Corvette were not limited to these mechanical difficulties. On September 30, 1982, the same day Alford bought the Corvette, the Alabama Department of Revenue sent a letter to John Reid, a criminal investigator with the Department of Public Safety—Alabama Bureau of Investigation (ABI), requesting that he check the vehicle identification numbers on this Corvette. When Reid went to Mobile Dodge to inspect the Corvette, Mobile Dodge informed him of the sale to Alford. Within thirty days of the time the request to investigate was made of him, Reid contacted Alford and told him to bring the Corvette by a certain Chevron service station for an inspection.

Corvettes have vehicle identification numbers in four places: the engine, transmission, left door pillar post, and on the frame. Reid determined by looking at the engine, transmission, and pillar post numbers that they were all V.I.N. 9392. Since the service station rack was in use and it looked as if it would soon rain, Reid did not check the number on the frame at that time. However, when he inspected the frame number later, he determined that that

number there was V.I.N. 4708. In his testimony at trial, Reid said that his investigation led him to the following conclusions: The Corvette that Alford had bought from Mobile Dodge was in fact made up of two different Corvettes. The frame and related parts belonged to a Corvette with V.I.N. 4708. The large amount of rust in that part of the automobile indicated that the Corvette with V.I.N. 4708 had been under water at one time. This fact would make the automobile a "salvage vehicle," and Reid reported that conclusion to the Department of Revenue. Reid also discovered that the Corvette with V.I.N. 4708 had been stolen during transit.

Reid testified that the engine, transmission, serial plate, and possibly the left door belonged to a Corvette with V.I.N. 9392. The record shows that the Corvette with V.I.N. 9392 had been wrecked in Texas on or before October 19, 1981, in a "relatively severe" front end collision. Alford introduced pictorial evidence of this wreck, to which Mobile Dodge objected.

Although V.I.N. 9392 was found only on the engine, transmission, and left door pillar post of the Corvette, Alford was given a bill of sale to a Corvette with that number.

The title history of the Corvette with V.I.N. 9392 is as follows: The automobile was owned by Robert Michael at the time it was wrecked in Texas on or before November 19, 1981. After the wreck, the Corvette was taken to a Houston, Texas, repair shop. The Corvette was never repaired; it was transferred to Houston Salvage Pool, a pool dealing in wrecked and "totalled" automobiles.

On December 8, 1981, the State of Texas issued a salvage certificate of title to Farmer's Insurance Group of Houston, Texas. This insurance company obtained title when it paid Robert Michael for his claim on the Corvette. Later that same month, Farmer's Insurance Group sold the Corvette to H & H Motors. On July 4, 1982, H & H

Motors sold the Corvette to Frank W. Allison, who, on September 26, 1982, traded the Corvette to Mobile Dodge as a down payment on a new truck.

The history of the Corvette with V.I.N. 4708 is unknown between the time it was stolen and the time its vehicle identification number was found on the Corvette in question.

Bertha Dunlap, title and lien examiner of the Motor Vehicle Division, Alabama Department of Revenue, testified as follows:

Frank Allison filed an application for an Alabama certificate of title for the Corvette on August 16, 1982. The Department of Revenue received this document on August 20, 1982. On that same day, August 20, a salvage certificate of title on the Corvette with V.I.N. 9392 was received by the Department of Revenue. That salvage certificate of title indicated Frank Allison's ownership of the Corvette. All of these documents were sent to the salvage unit of the Motor Vehicle Division of the Department. From August 25, 1982, to November 2, 1982, when title was issued, the file on Corvette V.I.N. 9392 was in suspense in the salvage unit of the Motor Vehicle Division.

Charles Patton, the supervisor of the salvage unit, sent the request to John Reid to inspect the Corvette. This request was dated September 30, 1982. The request indicated that the Corvette was located at Mobile Dodge. The Department of Revenue would have known the location of the Corvette only by inquiry from Mobile Dodge. This inquiry was made before September 30, the date of the sale to Alford. Any such inquiry from Mobile Dodge would have been immediately transferred to the salvage unit.

Kenneth Shereck, sales manager at Mobile Dodge on September 30, 1982, testified as follows:

He had spent twenty years in the automobile business and was an expert on Corvettes. In his career, he had bought and sold between 500 an 600 Corvettes, had owned many Corvettes personally, and was familiar with 1978 model Corvettes.

Part of Shereck's job was to approve used automobiles and to manage the "Used Car Department" of the dealership. When Allison brought the Corvette to Mobile Dodge, Shereck examined the Corvette in detail. He noticed the Corvette had been repainted and he admitted that this put him on notice that it could have been wrecked. He discovered paint overspray in various parts of the automobile. He wondered whether the Corvette had been under water at some time because the automobile had a musty smell. He found numerous other defects in the automobile.

Shereck recorded the results of his appraisal on an appraisal slip, on which he wrote "W" for "wholesale," to indicate that it was his recommendation that the Corvette not be sold to the public, but at auction.

Shereck told the owner of Mobile Dodge that he felt the Corvette should be sold at wholesale. However, the owner told Shereck to "clean up [the Corvette] and retail it." Four days later, the Corvette was sold to the plaintiff Alford.

Alford filed an action against Mobile Dodge, alleging various misrepresentations. At the end of all the evidence, Mobile Dodge moved for a directed verdict. This motion was denied. The jury returned a verdict in favor of Alford in the amount of $125,000. Mobile Dodge filed a motion for judgment notwithstanding the verdict, or in the alternative, for new trial and/or remittitur. This motion was also denied. Judgment was entered and this appeal followed.

Mobile Dodge presents four issues for our review:

I. Whether there was sufficient evidence to support the verdict regarding the alleged misrepresentations by Mobile Dodge as to title;

II. Whether the trial court erred when it admitted into evidence documents relating to the salvage title of the Corvette with V.I.N. 9392 and photographs of that Corvette in a wrecked condition;

III. Whether the trial court erred in its statement to the jury regarding the law of punitive damages;

IV. Whether the damages awarded by the jury were excessive and against the weight of the evidence.

I

One of the counts which went to the jury alleged as follows:

> "At the time of the negotiations for the sale of the 1978 Chevrolet Corvette the Defendant represented to the Plaintiff that the Defendant had good title to the Corvette and could and would transfer good title to the Plaintiff. Said representations by the Defendant were willful misrepresentations of material facts under Section 6-5-103 *Code of Alabama 1975* which were relied upon by the Plaintiff in purchasing the Corvette and fraudulent deceit upon the Plaintiff. The Plaintiff alleges that the Defendant at the time of the representations did not have good title to the Corvette."

Mobile Dodge contends that there was insufficient evidence to show that Mobile Dodge knew or should have known that it did not have good title to the Corvette. Since Mobile Dodge moved for a directed verdict as to this count at the end of all the evidence, specifically calling attention to the lack of evidence, and filed a motion for

a judgment notwithstanding the verdict, or in the alternative for a new trial, if there is no evidence to support this count, the verdict must be set aside, even though there was sufficient evidence to support the other misrepresentations count. *John Deere Industrial Equipment Co. v. Keller*, 431 So. 2d 1155 (Ala. 1983).[1]

The scintilla rule is the standard of evidence rule which this Court must apply. The question is whether there is any evidence or logical inference which can be drawn therefrom to support the jury verdict as to the count alleging willful misrepresentation of good title. *Allstate v. Alexander*, [MS. 84-637, December 12, 1985] ___ So. 2d _ (Ala. 1985). It is our view that there is evidence in the record to support a finding that Mobile Dodge knew or should have known that it did not have good title to the Corvette, and that it misrepresented that it could transfer good title. The jury could have found the following from the evidence: Mobile Dodge inquired of the salvage unit of the Motor Vehicle Division of the Department of Revenue as to the state of title to the Corvette before the automobile was sold to Alford. It was routine for Mobile Dodge to make such inquiries whenever a trade-in was brought to its lot by one who had no title, certificate or who, like Frank Allison, was making application for title. Shereck Gleason, finance manager for Mobile Dodge at the time of the sale of the Corvette to Alford, certified the

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[1]

> "[I]f a complaint has more than one count and the defendant believes that the evidence is not sufficient to support one or more of those counts, he must challenge this by motion for directed verdict, specifying the count which is not supported by the evidence and detailing with specificity the grounds upon which the particular count is not supported by the evidence. If this is not done and all counts go to the jury and a general verdict is returned, the court will presume that the verdict was returned on a valid count."

Aspinwall v. Gowens, 405 So. 2d 134, 138 (Ala. 1981).

title application filed by Alford. Gleason signed the following statement found on that application:

> "I hereby certify that the above described vehicle has been physically inspected by me and that the V.I.N. and descriptive data on this application are correct . . . ."

We cannot say the trial court was in error when it denied Mobile Dodge's motions for directed verdict and for J.N.O.V.

Mobile Dodge contends that even if the allegations that it misrepresented that it could transfer good title are true, Alford was not damaged because he received an Alabama certificate of title on the Corvette on February 2, 1983. However, this certificate of title was based on information obtained by John Reid during an initial investigation in which he checked only the three locations on the Corvette where V.I.N. 9392 was found and failed to check the frame number. On a subsequent inspection, he found that the number on the frame was different from the other three numbers.

It has been held that a certificate of title to an automobile is only prima facie evidence of ownership and can be contradicted by other evidence. *City Car Sales, Inc. v. McAlpin*, 380 So. 2d 865 (Ala. Civ. App. 1979), *cert. denied*, 38[illegible] So. 2d 869 (Ala. 1980). Furthermore, Code 1975, 32-8-49, provides that the Department of Revenue can suspend or revoke a certificate of title if it was fraudulently procured or erroneously issued. Therefore, Alford's title to the Corvette is in serious jeopardy, and thus he has been damaged by the fraudulent conduct of Mobile Dodge. Moreover, Mobile Dodge's contention in this regard is inconsistent with its contention in the second issue presented for review. In the second issue, it contends that the Corvette's true V.I.N. was 4708, which is not the vehicle identification number of the vehicle to which a certificate of title was issued to Alford, namely V.I.N. 9392. Likewise,

V.I.N. 4708 is a stolen vehicle and Mobile Dodge could never transfer good title to a stolen vehicle. *State Farm Mutual Automobile Insurance Co. v. Wagnon*, 53 Ala. App. 712, 304 So. 2d 216, (Ala. Civ. App. 1974).

II

Mobile Dodge next contends that the trial court erred when it admitted into evidence over objection documents relating to the salvage title of the Corvette with V.I.N. 9392 and photographs of that Corvette in a wrecked condition. Mobile Dodge argues that the Corvette's true V.I.N. was 4708 and, therefore, that the above evidence was misleading and prejudicial.

Rulings as to the admissibility of evidence will not be disturbed on appeal in the absence of a gross abuse of discretion. *Russellville Flower Craft, Inc. v. Searcy*, 452 So. 2d 478 (Ala. 1984).

The photographs of the Corvette in its wrecked condition were relevant to show the damages sustained by Alford from the fraud. The salvage documents were relevant to the issues relating to title, and to the question of whether the Corvette should have been held out for sale to the public. The trial court did not abuse its discretion when it admitted this evidence.

III

Mobile Dodge next asserts that the trial court erred in its statement to the jury regarding the law of punitive damages. The trial court charged the jury as follows:

> "In addition to actual or compensatory damages, the law authorizes a jury to award punitive damages in fraud and deceit actions if it is shown to the reasonable satisfaction of the jury by the evidence that the fraud or the deceit was malicious, oppressive or gross or a misrepresentation

> made with knowledge of its falseness or so recklessly done as to amount to the same thing and committed with the intent to injure and to defraud.
>
> "If you are reasonably satisfied from the evidence that the defendant was guilty of a fraud or deceit as charged by the plaintiff and that such fraud or deceit was malicious, oppressive or gross and made with the intent to injure and defraud the plaintiff and the plaintiff did suffer damage as a proximate result of such fraud or deceit, then in your discretion you may award the plaintiff punitive damages in addition to any actual damage you find from the evidence the plaintiff did suffer."

Mobile Dodge argues that punitive damages should be allowed only under "exceptional and extraordinary circumstances clearly indicating aggravated, malicious or spiteful conduct" (quoting from Chief Justice Torbert's dissenting opinion in *Winn-Dixie Montgomery, Inc. v. Henderson*, 395 So. 2d 475 (Ala. 1981)). If this were the standard for the imposition of punitive damages in Alabama, the trial court would not be in error, because its instructions included the phrase "malicious, oppressive or gross" in addition to the requirement of intent to deceive. However, the fact that the law requires only an intent to deceive or defraud for the imposition of punitive damages, *American Honda Motor Co. v. Boyd*, 475 So. 2d 835 (Ala. 1985), does not place the trial court in error insofar as the defendant Mobile Dodge is concerned.

IV

Last, Mobile Dodge contends that the damages awarded by the jury were excessive and against the weight of the evidence. It asks this Court to grant a remittitur.

This Court has held that a remittitur or a new trial should not be ordered on the grounds of excessiveness of the jury's verdict except in those cases where the Court can see that the verdict has been reached on account of bias, passion, prejudice, corruption, or other improper motive. *Vest v. Gay*, 275 Ala. 286, 154 So. 2d 297 (1963); *Airheart v. Green*, 267 Ala. 689, 104 So. 2d 687 (1958). In short, a remittitur or a new trial should be ordered on the ground of excessiveness where there is an improperly functioning jury.

This Court will not disturb the trial court's ruling on the damages issue unless this Court finds the trial court's decision to be a "plain and palpable" error. *Vest v. Gay*, *supra*.

This Court has upheld verdicts with punitive damages awards in fraud and misrepresentation cases in excess of the award in the present case. *National Security Fire & Casualty Co. v. Bowen*, 447 So. 2d 133 (Ala. 1983) ($1,500,000); *Shiloh Construction Co. v. Mercury Construction Corp.*, 392 So. 2d 809 (Ala. 1980) ($559,966.61); *National States Insurance Co. v. Jones*, 393 So. 2d 1361 (Ala. 1980) ($500,000); *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Griffin*, [MS. 84-452, January 17, 1986] ___ So. 2d ___ (Ala. 1986) ($276,368) (Torbert, C. J., and Adams and Houston, JJ., dissenting on the issue of remittitur).

We look first to the enormity of the wrong. Alford was sold an automobile consisting of parts from two separate automobiles. One of these automobiles had been stolen, thus placing Alford's ownership of the present automobile into question. The other automobile had been wrecked and salvaged in Texas. The present automobile is encrusted with rust, probably a result of its having been subjected to water damage. The extent of the true damage to the present automobile is unknown. What is known in that Alford, the passengers and guests in this Corvette, and

the general public using the public streets and highways and the sidewalks abutting the same were subjected to a substantial risk of bodily harm and even death by the sale of the seriously defective vehicle by Mobile Dodge to Alford with representations that it was in excellent condition and had never been wrecked. See *Treadwell Ford, Inc. v. Campbell*, 485 So. 2d 312 (Ala. 1986).

Although this was a general verdict and we do not know what portion of the award would relate to compensatory damages, due to the enormity of the wrong in this case, we would affirm an award of $125,000 solely as punitive damages.

AFFIRMED.

Torbert, C. J., Faulkner, Almon, and Beatty, JJ., concur.

APPENDIX B

MAILING ADDRESS: TELEPHONE: 261-4609

P.O. Box 157
Montgomery, Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 84-1006

MOBILE DODGE, INC., a Corp. (Appellant) vs. DANNY R. ALFORD (Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

___ Appeal docketed. Future correspondence should refer to the above number.

___ Court Reporter granted additional time to file reporter's transcript to and including

___ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

___ Appell ___ granted 7 additional days to file briefs to and including

___ Record on Appeal filed

___ Appendix Filed

___ Submitted on Briefs

___ Petition for Writ of Certiorari denied. No opinion.

xx-xxx Application for rehearing overruled. No opinion written on rehearing. Houston, J.—Torbert, CJ., Maddox, Almon & Beatty, JJ., concur.

—— Permission to file amicus curiae briefs granted ——

4/25/86

/s/ ROBERT G. ESDALE
ROBERT G. ESDALE, CLERK
Supreme Court of Alabama

APPENDIX C

February 14, 1986

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

84-1006

MOBILE DODGE, INC., a Corporation
v.

DANNY R. ALFORD

MOBILE CIRCUIT COURT
#CV 83-000109

This cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Mobile Dodge, Inc., a Corporation, and Allied Fidelity Insurance Company, surety on the supersedeas bond, pay the amount of the judgment of the circuit court plus ten percent damages and interest and the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which let execution issue.

OPINION BY HOUSTON, J.

TORBERT, CJ., FAULKNER, ALMON AND BEATTY, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of

the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 13 day of May 1986.

/s/ ROBERT G. ESDALE
ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF ALABAMA

S.C. 84-1006

MOBILE DOGE, INC., a corporation,
Appellant, Defendant,

vs.

DANNY R. ALFORD,
Appellee/Plaintiff.

FILED
JULY 18, 1986
CLERK
Supreme Court of Alabama

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mobile Dodge, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from:

(a) The final decision of the Supreme Court of Alabama of February 14, 1986, affirming the judgment of the Circuit Court of Mobile County against Appellant, and the order of the Supreme Court of Alabama dated May 13, 1986 entering final judgment against Appellant and imposing on Appellant the ten (10%) percent penalty prescribed by Section 12-22-72, Code of Alabama (1975); and

(b) The final order issued by the Supreme Court of Alabama overruling Appellant's Application for Rehearing entered on April 25, 1986.

This Appeal is taken pursuant to 28 U.S.C. Section 1257(2).

ENGEL, WALSH and ZOGHBY
Attorneys for Appellant
Post Office Box 1045
Mobile, Alabama 36633

By: /s/ MYLAN R. ENGEL
MYLAN R. ENGEL

By: /s/ ALEX W. ZOGHBY
ALEX W. ZOGHBY

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 18th day of July, 1986 served a copy of the foregoing on the Honorable Charles Graddick, Attorney General, and Vincent F. Kilborn, Attorney at Law, counsel for all parties concerned, by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ ALEX W. ZOGHBY
ALEX W. ZOGHBY